

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SUSIE MAE CONNER,

Defendant-Appellant.

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UNPUBLISHED

March 10, 2005

No. 253179

Mecosta Circuit Court

LC No. 02-005010-FC

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree premeditated murder, MCL 750.316(a), one count of felony murder, MCL 750.316(b), and one count of kidnapping, MCL 750.349. The court combined the two murder convictions into one first-degree murder conviction based on the alternative theories of premeditation and felony murder, and vacated the kidnapping conviction. Defendant was sentenced to life imprisonment without parole. We affirm.

Defendant first argues that the trial court violated her Confrontation Clause<sup>1</sup> rights when it permitted her son to testify to statements made by her former husband and non-testifying codefendant. We disagree.

This Court has long recognized that, in the context of evidentiary issues, a defendant waives review of the admission of evidence which he introduced, or which was made relevant by his own placement of a matter in issue. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Moreover, our Supreme Court, in *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), stated that a party who waives his rights by intentional relinquishment or abandonment “may not then seek appellate review of a claimed deprivation of those rights for his waiver has extinguished any error” (citations omitted). Waiver is available in a broad array of constitutional and statutory provisions and even the “most basic rights of criminal defendants are . . . subject to waiver.” *New York v Hill*, 528 US 110, 114; 120 S Ct 797; 145 L Ed 2d 560 (2000) (citation omitted). Only the defendant can waive certain fundamental rights, but for other

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<sup>1</sup> US Const, Am VI; Const 1963, art 1, § 20.

rights, including evidentiary decisions, defendant's trial counsel alone may effect a waiver. *Id.* at 115. "Absent a demonstration of ineffectiveness, counsel's word on such matters is the last." *Id.*

Our Supreme Court has applied the waiver rule to a defendant's Confrontation Clause rights. *People v Riley*, 465 Mich 442; 636 NW2d 514 (2001). In *Riley*, the defendant himself called to the stand the witness who gave the offending testimony, knowing that there was no likelihood that the witness would be able to provide first hand information. *Id.* at 444-445. This witness then, in the course of her testimony regarding statements made to her by another suspect in the charged crime, surprised defendant by implicating him in the crime. *Id.* at 445. On appeal defendant argued that his Confrontation Clause rights had been violated, and this Court agreed. *Id.* at 446. However, our Supreme Court disagreed with this Court and held that defendant had knowingly waived his Confrontation Clause rights when he called the witness to the stand with the knowledge that she might incriminate him. *Id.* at 448. Accordingly, the Court found that it was not necessary to reach the Confrontation Clause issue. *Id.* at 449.

In the present case, the prosecutor called defendant's son and elicited testimony from him regarding the events just before defendant and his father left with the victim in the back of defendant's truck. Defendant's son testified that his father said, "Just leave it be, it's a simple assault, take her to the hospital, drop her off, take her to her mother's house, leave her at her ma's house, she can make up whatever story she wants to make up as far as how she got drugged and got beat up, whatever, just leave it as is." This statement does not directly implicate defendant in the victim's murder, but rather only suggests that defendant participated in an assault on the victim, which defendant's son already testified to witnessing. Furthermore, it is clear from the prosecution's later questioning that the testimony was elicited to explain a possible inconsistency in defendant's son's statements to the police where he indicated that his father may have participated in the assault on the victim. Aside from this statement, the prosecutor did not elicit hearsay statements by defendant's former husband through her son's testimony on direct examination. On the contrary, it was defendant's own trial counsel who elicited the hearsay testimony on cross-examination of defendant's son, to which the prosecutor responded on redirect, and which she now claims prejudiced her trial.

However, defendant argues that she had no choice but to delve into the hearsay to react to the testimony elicited by the prosecutor from her son on direct examination. She contends that the testimony by her son that he recorded conversations with her former husband regarding the events of that night coupled with testimony concerning her reactions to some of those conversations forced her to explore the substance of the hearsay statements on cross-examination to point out inconsistencies with the physical evidence. We find no merit to this argument. The prosecutor had the right to elicit relevant testimony from defendant's son regarding his cooperation with the police and defendant's reactions to conversations about the events of that night. Nothing in that testimony constituted a hearsay statement by defendant's former husband implicating defendant's Sixth Amendment rights or otherwise compelling her to address her former husband's statements. The hearsay statements by defendant's former husband, other than the assault statements, were brought out by defendant on cross-examination of her son and by the prosecutor in response to defendant's cross-examination. Defendant cannot deliberately bring out that testimony in the hope that the inconsistencies will benefit her while harboring error as an appellate parachute. *Carter, supra* at 214.

By electing to cross-examine her son regarding her former husband's statements, knowing that those statements implicated her in the murder, defendant waived her Confrontation Clause rights. *Riley, supra*. Consequently, any error was extinguished.

Defendant next argues that the prosecutor engaged in misconduct that denied her a fair trial when he elicited testimony from a pathologist, that was beyond the scope of the expert's knowledge. We disagree. We review claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). This Court reviews unpreserved claims of prosecutorial misconduct, such as this one, "for plain error affecting the defendant's substantial rights." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). To warrant reversal, defendant must show that: "(1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant's substantial rights." *Id.* (citation omitted). The third factor requires that the defendant demonstrate that the error was outcome determinative. *Id.* Even if all of these elements are shown, this Court may not reverse unless the error resulted in the conviction of an actually innocent person or "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.*

At trial, the prosecutor called a pathologist, who was qualified as an expert, to testify regarding the method of the victim's death. The pathologist testified that he looked to the history surrounding how the death occurred or how the body was found, and that this played a role in making a finding as to the person's method of death. Further, the expert testified that knowing that defendant had lived in the area where the victim's body was found made it more likely, in his opinion, that the method of death was homicide. He explained that this was based on specialized knowledge of common body disposal patterns that he acquired from professional lectures he had attended. Therefore, under these circumstances, the testimony was within his area of specialized knowledge and was admissible pursuant to MRE 702.<sup>2</sup> Accordingly, this evidence was properly admissible and the prosecutor did not commit misconduct by eliciting it.

Such was not the case, however, with regard to the testimony regarding premeditation. The function of an expert is to supply expert testimony in the form of an opinion, which may embrace an ultimate issue of fact. *Carson Fisher Potts & Hyman v Hyman*, 220 Mich App 116, 122; 559 NW2d 54 (1996); MRE 704. However, an expert witness may not tell the jury how to decide the case. *Hyman, supra* at 122-123. "Therefore, it is error to permit a witness to give the witness' own opinion or interpretation of the facts because doing so would invade the province of the jury." *Id.* at 123. Consequently, permitting the prosecution's expert to interpret his own testimony regarding the amount of time that it takes to drown someone and opine that that this amount of time was sufficient to premeditate, was clear error. Premeditation is an essential

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<sup>2</sup> MRE 702, as in effect at the time of trial, provided that:

If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

element of first-degree premeditated murder, see *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002), and should have been left to the jury alone to decide.

However, at trial, the jury heard overwhelming evidence that defendant deliberately and premeditatedly killed the victim. The jury heard testimony from defendant's own son that she became angry with the victim when the victim failed to obtain the marijuana she had wanted. Defendant's son testified that defendant repeatedly threatened to kill the victim after she became angry and that, throughout the ordeal, the victim was pleading for her life. Defendant's son went on to describe in vivid detail how defendant ordered him to assist her in binding, drugging, and chaining the victim in the back of defendant's truck. On cross-examination, defendant's son further testified that when defendant and his father returned, his father said that both he and defendant had to hold the victim down because she kept bobbing up in the water.

In light of this devastating testimony and the substantial amount of circumstantial evidence introduced against defendant in this case, we conclude that the error committed by the introduction of the pathologist's opinion regarding premeditation could not have affected the outcome of the trial. See *McLaughlin*, *supra* at 645. Moreover, even if we could so conclude, we see no basis to support a finding that the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings. Therefore, there was no plain error warranting reversal.

Defendant next argues that the trial court abused its discretion when it permitted the prosecution to introduce testimony regarding new physical evidence found by testing done during the course of the trial. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002), quoting *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). Even if an evidentiary error occurred, it will not merit reversal in a criminal case unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant first argues that the prosecutor violated the rules of discovery by only informing defendant of the new evidence during the trial itself. However, defendant has not provided any evidence to support a finding that the prosecutor violated the rules of discovery. Defendant bears the burden of furnishing this Court with a record to verify the factual basis of any argument upon which reversal is predicated. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). In the absence of any evidence to support the conclusion that the prosecutor violated the rules of discovery in connection with the new evidence, we find this argument to be without merit.

Defendant next argues that the trial court violated her right to a fair trial by introducing the newly discovered evidence. The crux of this argument is that, because the evidence was discovered so late in the trial process, introduction of the new evidence had the result of preventing defendant from effectively cross-examining her son, the primary witness against her, because the new evidence was discovered after that witness had already testified. Further, defendant argues that, had she known of this evidence before trial, her entire trial strategy would have been different.

First, although defendant cross-examined this witness extensively over two days of trial, amounting to nearly two hundred pages of transcript, defendant did not question him about the lack of evidence of duct tape on the victim's clothing. The only questioning even remotely related to the scientific findings was when defendant elicited testimony from him that he only remembered wrapping the tape around the victim's skin itself and not her clothing. Yet, the newly discovered evidence concerned additional findings consistent with duct tape on the victim's coat. Given that defendant did not emphasize the lack of evidence of duct tape on the victim's clothing in cross-examining this witness, we find that defendant has not demonstrated that she was denied the ability to effectively cross-examine this witness by the late discovery of the new evidence. Moreover, defendant has not demonstrated how her trial strategy would have been different had the newly discovered evidence been available before trial and how it might have altered its outcome. Accordingly, defendant has failed to demonstrate that the admission of the evidence was error warranting reversal.

Finally, defendant argues that the court abused its discretion when it admitted the new evidence because this evidence was obtained from the victim's clothing and the prosecution had failed to establish a proper chain of custody for this clothing. We disagree. This Court has held that the admission of real evidence does not require a perfect chain of custody. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). "Any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims." *Id.* at 130-131. In the present case, the prosecutor presented sufficient evidence that the clothing was that taken from the victim's body. Accordingly, the newly discovered evidence was not excludable on the ground that the chain of custody was incomplete.

Affirmed.

/s/ Henry William Saad  
/s/ Michael R. Smolenski  
/s/ Jessica R. Cooper